APPENDICES

APPENDIX A

[Filed Mar. 12, 1997]

Fourth Appellate District, Division One, No. D021944
S058726

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM L. SHAFER,
Appellant

v.

CITY OF OCEANSIDE *et al.*,
Respondents

Respondents' petition for review DENIED.

GEORGE
Chief Justice

APPENDIX B

[Filed Dec. 17, 1996]

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D021944
(Super. Ct. No. N57302)

WILLIAM L. SHAFER,
Plaintiff and Appellant,

v.

CITY OF OCEANSIDE *et al.*,
Defendants and Respondents.

APPEAL from a judgment of the Supreme Court of San Diego County, Herbert B. Hoffman, Judge. Reversed.

William L. Shafer appeals an adverse judgment of the superior court after trial of his civil rights action against defendants the City of Oceanside (City) and John Mamaux, its former city manager. (42 U.S.C. § 1983 (section 1983).) Shafer does not challenge the trial court's finding that he did not have a constitutionally protected property interest in obtaining reemployment by rehire or reinstatement from an eligibility list after he resigned from City employment as a firefighter/paramedic. However, he contends the trial court erroneously granted a judgment on the pleadings, on its own motion, to the effect that Shafer could not pursue a claim for damages for violation of civil rights for the City's failure to rehire or reinstate him as alleged retaliation against him for an

earlier exercise of his protected free speech rights. (U.S. Const., 1st Amend.) Shafer also contends that related causes of action against Mamaux, conspiracy and intentional infliction of emotional distress, remain viable even absent such a protected property interest.

We disagree with the trial court's conclusion that Shafer's damages claim for free speech violations is inextricably linked with his employment status as a former employee who had no current property right in reemployment. Rather, existing authority requires us to view his claim of deprivation of a governmental benefit or privilege, due to his exercise of free speech rights, separately from his employment status for purposes of analyzing this First Amendment claim and the related causes of action. (*Rutan* v. *Republican Party of Illinois* (1990) 497 U.S. 62; *Perry* v. *Sindermann* (1972) 408 U.S. 593.) We therefore reverse the judgment.

I

Standard of Review

The legal issue presented is the relationship between Shafer's unsuccessful claim to a property right of employment and his claim of unlawful retaliation for exercise of his right of free speech, the main subject of this appeal. Because this is an appeal of a judgment on the pleadings on that theory, "[t]he task of this court is to determine whether the complaint states a cause of action. All facts alleged in the complaint are deemed admitted, and we give the complaint a reasonable interpretation by reading it as a whole and all of its parts in their context. [Citations.] We are not concerned with a plaintiff's possible inability to prove the claims made in the complaint, the allegations of which are accepted as true and liberally construed with a view toward attaining substantial justice. [Citations.]" (*Lance Camper Manufacturing Corp.* v. *Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 199.) Moreover, on appeal, " 'we are not bound by the determination of

the trial court, but are required to render our independent judgment on whether a cause of action has been stated.' [Citation.]" (Ibid.)

II

Background

The parties agree that the facts in this matter are important mainly as a backdrop to the legal issues presented. Using this approach, we briefly summarize the facts as alleged in the first amended complaint, adding to some extent various factual details as laid out in pretrial summary judgment proceedings. While Shafer was employed as a City firefighter, he wrote an article for a local newspaper criticizing the City administration's budget cuts and proposed changes in the firefighting/paramedic delivery system. This article was originally anonymous, but was later correctly attributed to Shafer. He was informally reprimanded about writing the article but received no discipline and was later promoted after the article episode.

In May 1991, Shafer resigned his employment to take care of personal problems and to start his own business. He alleges he did this in light of a de facto City policy of rehiring all firefighters who resigned in good standing and sought rehire within two years of their resignation.

In January 1992, Shafer applied to the City for reinstatement and was placed on the eligibility list. However, when he admitted to Mamaux, upon being questioned, that he had written the article in question, he was told he would not be reinstated and he would never work for the City again. The City hired other firefighters off the eligibility list while Shafer was eligible, including persons with lesser qualifications than his. Most or all other firefighters who had recently sought reinstatement were rehired. Shafer was not rehired.

Shafer brought this action for damages for civil rights violations against the City and Mamaux on the two theories described, loss of a protected property right in

employment and infringement of free speech rights. Mamaux was additionally charged as a defendant with conspiracy to violate civil rights and with intentional infliction of emotional distress. Various pretrial motions were brought, including summary judgment motions by the City and Mamaux, which were denied.

The matter went to jury trial, but the trial court discharged the jury after determining that preliminary legal issues remained to be addressed. The trial court then took evidence and briefing on the property right to employment issue, and determined it adversely to Shafer. The court then ruled that Shafer could not proceed on his free speech claim in the absence of a protected property right to public employment, explaining in its statement of decision: "Plaintiff has failed to cite any case or authority that stands for the proposition that a cause of action lies for failure to hire a new job applicant because of a previously exercised constitutional right, such as freedom of speech. Plaintiff was not dismissed from employment for writing his article. He voluntarily resigned and was subsequently not rehired as a new job applicant." The trial court thus concluded that Shafer's case did not constitute a discharge or dismissal from employment because of a First Amendment exercise.

Further, the court found that the claims against Mamaux were so closely related to the other claims that they must fall also. Judgment was entered nunc pro tunc and Shafer appeals.

III

Shafer's Status Regarding Reinstatement

The City and Mamaux argue, and the trial court found, that Shafer's beliefs that he would certainly be reinstated on application after his resignation were only a unilateral understanding, and no mutually explicit understanding among the City or its employees existed with regard to a right to automatic reinstatement. The trial court thus

viewed Shafer as a mere applicant for employment, with no right to reinstatement. Such an applicant, it concluded, had no basis for a civil rights action based on the theory of retaliation for free speech exercise.

To analyze the trial court's conclusions, we first evaluate the nature of the deprivation of rights claimed here: Shafer is alleging his request for reinstatement, i.e., the government benefit of opportunity for employment, was not processed fairly because he was being penalized for speaking out on an issue of public concern pursuant to his First Amendment rights. He claims that his exercise of free speech played too large a part in the City's denial to him of a governmental benefit. The issue we must address is whether such an applicant for employment has a cognizable claim under title 42 of the United States Code, section 1983.[1]

IV

Free Speech Claimants under Section 1983

In *Perry* v. *Sindermann, supra,* 408 U.S. 593, 597, the Supreme Court dealt with the question of whether a teacher whose one-year contract was not renewed, allegedly because of his exercise of free speech rights, could bring a claim that the nonrenewal of his contract violated the First and Fourteenth Amendments even though he lacked a contractual or tenure right to reemployment. The Supreme Court held that such a claim was cognizable, for these reasons:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the

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[1] Shafer has alleged his civil rights claim against both the City and Mamaux, its former city manager. In discussing that cause of action, we refer to these defendants collectively as the City. The other two causes of action alleged against Mamaux as an individual will, as the trial court found, stand or fall with the civil rights claims. As we will explain, they remain valid at this pleadings stage of the proceedings.

government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' [Citation.] Such interference with constitutional rights is impermissible.

". . . .

"Thus, the respondent's lack of a contractual or tenure 'right' to re-employment for the 1969-1970 academic year is immaterial to his free speech claim." (Ibid.)

In *Rutan* v. *Republican Party of Illinois, supra*, 497 U.S. 62, 76-79, the majority opinion relied on this passage from *Perry* v. *Sindermann, supra*, 408 U.S. at page 597 to hold that a plaintiff, Moore, who claimed he had been repeatedly denied state employment because he did not have the support of Republican Party officials, could assert a claim that his First Amendment rights had been violated, even though he had no claim of right to employment in the first place. (*Rutan, supra*, 497 U.S. at p. 77 fn. 9.) Although *Rutan* arose in the context of political patronage hiring and personnel practices, its statements on First Amendment rights extend to this context as well: "Patronage hiring places burdens on free speech and association similar to those imposed by the patronage practices discussed above." (Id. at p. 77.)[2] We are presented

[2] In its ruling, the trial court relied on *Messer v. Curci* (6th Cir. 1989) 881 F.2d 219 for the proposition that a mere applicant for employment may not state a section 1983 claim based on free speech violations by alleging that preference was given to other appli-

with a more traditional free speech exercise, and may thus apply the analysis of *Rutan* in this context. There, the court concluded,

> "It is unnecessary here to consider whether not being hired is less burdensome than being discharged, because the government is not pressed to do *either* on the basis of political affiliation. The question in the patronage context is not which penalty is more acute but whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights. [¶] If Moore's employment application was set aside because he chose not to support the Republican Party, as he asserts, then Moore's First Amendment rights have been violated. Therefore, we find that Moore's complaint was improperly dismissed." (*Id.* at p. 79.)

Another case holding that a First Amendment civil rights claim may be asserted by a plaintiff having no property interest in a particular employment position is *Hyland* v. *Wonder* (9th Cir. 1992) 972 F.2d 1129. Plaintiff Hyland worked for some time as a volunteer for the San Francisco Juvenile Probation Department. He prepared a memorandum to the judges supervising the San Francisco Juvenile Hall, detailing numerous problems he saw at the Hall and the perceived failings of its director. His volunteer status and privileges were terminated after his supervisor learned of the memorandum's existence. Hyland sued various public officials, alleging that his termination constituted impermissible retaliation for pro-

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cants because of their political activities. That decision was vacated by the Supreme Court after *Rutan* and the matter was remanded to the Court of Appeals, which reversed the district court's judgment dismissing the complaint and remanded for further proceedings in light of *Rutan*. (*Messer v. Curci* (1990) 497 U.S. 1001; subsequent opn. *Messer v. Curci* (6th Cir. 1990) 908 F.2d 103.) The dicussion relied on by the trial court is thus not of assistance on this appeal.

tected speech in violation of the First and Fourteenth Amendments to the federal Constitution. His complaint was dismissed and he appealed.

In discussing Hyland's status as either a public employee or a volunteer, the Court of Appeals ruled that that issue was not determinative of his entitlement to First Amendment protection. Rather, the Court of Appeals discerned "broader constitutional principles animating the Supreme Court's decisions on public employee speech. [¶] The right of public employees to speak on matters of public concern, acknowledged in cases like *Connick* v. *Myers* [(1983) 461 U.S. 138] is an outgrowth of the constitutional tenet that public officials may not deny or deprive a person of a governmental benefit or privilege on a basis that infringes her or his freedom of speech. (*Perry* v. *Sindermann*, 408 U.S. 593, 597.)" (*Hyland* v. *Wonder*, *supra*, 972 F2d at p. 1134.)

Regarding the plaintiff's status, the Court of Appeals concluded that "the relevant question, for purposes of Hyland's First Amendment claim, is not whether Hyland was a public employee, but rather whether the opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny. We hold that it does." (*Hyland* v. *Wonder*, *supra*, 972 F.2d at p. 1135.) The court continued:

> "In sum, whether Hyland is labelled a public employee or a volunteer is not determinative of whether Hyland stated a claim of First Amendment infringement. Nor is the at-will nature of his position dispositive. The critical question is simply whether Hyland has alleged the loss of a valuable governmental benefit or privilege in retaliation for his speech. We conclude that the loss of a high-level volunteer position, such as that held by Hyland in the [Juvenile Probation Department], constitutes a

deprivation of a valuable governmental benefit or privilege." (*Id.* at p. 1136.) [8]

From this authority we conclude that Shafer, as an applicant for reinstatement to his former position, may state a claim for denial of his First Amendment rights as alleged. Shafer must be allowed to attempt to make a factual showing that the City and Mamaux, its official, made a decision not to rehire him in order to punish or penalize him for the exercise of his First Amendment rights. The "critical question" is whether he has alleged the loss of a valuable government benefit or privilege as retaliation for his speech. (*Hyland* v. *Wonder, supra*, 972 F.2d at p. 1136.) The trial court accordingly erred in granting judgment on the pleadings, in light of the broad constitutional principles outlined above which are to be applied toward reaching the goal of protecting speech on matters of public concern in the public employment arena.

V

Role of Free Speech in Denial of Benefit

For the guidance of the trial court, we outline the issues to be dealt with on remand after resolution of this pleadings question. As in *Perry, supra*, 408 U.S. at page 598, this case was terminated before the necessary factual inquiries took place:

"In this case, of course, the [plaintiff] has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the [public entity's] action was invalid."

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[8] See also *Janusaitis* v. *Middlebury Volunteer Fire. Etc.* (2d Cir. 1979) 607 F.2d 17, where the court held that the dismissal of a volunteer firefighter for complaining about low morale and inadequate training and discipline could violate the First Amendment. (*Id.* at p. 25.)

In general, the courts are solicitous of a public employer's right to make good faith discretionary hiring decisions. In that regard, the authority of *Mt. Healthy City Bd. of Ed.* v. *Doyle* (1977) 429 U.S. 274 provides guidance. There, the court discussed the causation inquiry that is necessary when an employee is not hired or rehired, in order to distinguish between results caused by constitutional violations or other factors. The court stated:

> "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." (*Id.* at p. 287, fn. omitted.)

No such factual inquiry has yet been conducted here and we therefore remand for appropriate further proceedings.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings in accordance with the views expressed in this opinion. Costs to appellant.

/s/ Huffman
HUFFMAN, J.

WE CONCUR:

/s/ Kremer
KREMER, P.J.

/s/ Haller
HALLER, J.

APPENDIX C

[Filed Jan. 15, 1997]

COURT OF APPEAL
FOURTH APPELLANT DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D021944

(Super. Ct. No. N57302)

WILLIAM L. SHAFER,
Plaintiff and Appellant,

v.

CITY OF OCEANSIDE *et al.*,
Defendants and Respondents.

THE COURT:

The petition for rehearing is denied.

/s/ Kremer
KREMER, P.J.

APPENDIX D

[Filed Aug. 3, 1994]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

Case No. N 57302

WILLIAM L. SHAFER,
Plaintiff,

vs.

CITY OF OCEANSIDE, JOHN MAMAUX and DOES 1 through 20, inclusive,
Defendants.

STATEMENT OF DECISION

On January 18, 1994, this matter came before the Court as a First Amendment Civil Rights action under 42 U.S.C. § 1983. Plaintiff William Shafer (hereafter "Plaintiff") is a former firefighter with the City of Oceanside who resigned and unsuccessfully sought reinstatement or rehire with the Fire Department. Plaintiff's complaint against Defendant City of Oceanside and former City Manager John Mamaux alleged violations of his freedom of speech, conspiracy to violate his civil rights and intentional infliction of emotional distress (against Defendant Mamaux). Plaintiff has alleged in his First Amended Complaint that he was not rehired by the Fire Department at the direction of Defendant John Mamaux because of a newspaper article that he wrote critical of a planned reorganization of the Fire Department orchestrated by the City Council. He further alleged the City had a policy of reinstating firefighters who resigned in good standing, thereby creating a defacto property right in reinstatement

and alleging thereon that he was entitled to due process protections in his request for reinstatement.

On January 18, 1994, the Court ruled that it would first make a determination as to whether Plaintiff possessed a property interest in reemployment with the City of Oceanside thereby creating a nexus between Plaintiff's free speech exercise and the denial of reemployment. The Court demed this to be a question of law to be decided at the preliminary stage of these proceedings. The Court therefore bifurcated the trial to determine whether Plaintiff had a property right to reemployment with the City of Oceanside.

The Plaintiff testified that he resigned from the Fire Department perhaps intending to return if a private painting busines did not thrive. He believed that if he resigned in good standing and there was a departmental vacancy, he would be automatically or routinely rehired if he applied for reinstatement within two (2) years from his resignation date. Plaintiff candidly admitted that no one guaranteed his rehire by the City. He allegedly based his belief upon the rehiring of approximately four (4) former firefighters over a period of several years. He testified that he had spoken to Eric Osterberg (a rehired firefighter) and Captain Hugh Fleming about reinstatement prior to resigning.

Plaintiff admitted that not one person within the City ever guaranteed him or promised him that he would ever be rehired. Furthermore, he never produced any rule, writing, independent witnesses or firefighters that corroborated his testimony or beliefs that automatic rehire with the Fire Department was a right of former employees. It was clear from the testimony presented that Plaintiff had only a unilateral belief or expectancy of automatic rehire with the Fire Department.

The defense produced several witnesses that rebutted Plaintiff's unilateral belief relative to the City's reinstate-

ment practices. Mary Kaerth, former City Personal Director and Dwight Hill, current Personnel Manager, both testified as to the City's rules on reinstatement. Both testified that the City reinstatement policy vests absolute discretion in the City Fire Chief in making decisions as to the rehiring of former employees/firefighters. Both stated that reinstatement was not a right and that there was no practice or custom such that former employees would be automatically or routinely rehired. In fact, Dwight Hill testified that at least 20-25 former City workers were not rehired in the past five years. He further testified that the City rules do not even require that those firefighters on the reinstatement eligibility list be interviewed by the City's Fire Chief. In this case, the testimony revealed that the Plaintiff was actually interviewed by Fire Chief Dale Geldert.

James Rankin, former Fire Chief testified that he explained this reinstatement process to the plaintiff prior to his resignation. He further discussed with Plaintiff that rehire was only granted upon recommendation from supervisors and staff, personnel file review and analysis as to the needs of the department. Dale Geldert, the current Fire Chief, testified that he used a similar process when considering rehiring firefighters, and that he considered Plaintiff for each opening in the department from early 1992 until Plaintiff's eligibility ended.

Jack Francis of the Fire Department likewise testified as to the highly discretionary nature of considering/rehiring reinstatement applicants. He stated that there is no departmental practice or policy of automatically rehiring former firefighters.

Hugh Fleming corroborated Jack Francis' testimony in stating that there was/is no guarantee of rehire with the department. This was especially true around 1991, with the budget problems and downsizing of the Fire Department in progress. He stated that rehire was discretionary with the department, and that he urged Plaintiff not to

resign given the uncertain future of the Fire Department and the administrative discretion that goes into decisions to rehire former firefighters. Despite his urgings Plaintiff resigned anyway.

At the close of the evidence, the Court invited briefing on the issues raised at this preliminary trial and, in addition, identified further issues of concern with respect to Plaintiff's ability to state a claim for violation of free speech rights. Plaintiff contended that, irrespective of the outcome of this first phase of trial, he should be allowed to proceed with his claim of violation of free speech rights.

The Court asked that the parties analyze three issues in supplemental trial briefs:

1. Did Plaintiff have a "property right" in reemployment as a matter of law?

2. Assuming Plaintiff had a property right, was there are denial of due process warranting damages as a result?

3. Assuming Plaintiff has no property right in reemployment, may his First Amendment civil rights cause of action remain and proceed to trial?

After reading and considering the briefs submitted by all parties, the Court determines that the testimony overwhelmingly demonstrates that there was no property right with respect to Plaintiff's reemployment by the City of Oceanside as a matter of law.

The Plaintiff indicated that no one within the City had ever guaranteed him that he would ever be rehired. Plaintiff also admitted that he was warned about resigning and that he received a letter directing his attention to the rule that related to reinstatement, which basically only allows an employee to be placed on an eligibility list within two years without having to go through the necessity of an application or a test.

The Court further determines that Plaintiff's allegations that he had a defacto property right to rehire were based upon his own unilateral understanding. There is no evidence that there was a mutually explicit understanding among the City or its employees respecting a right to automatic reinstatement. The evidence by more than a preponderance establishes this fact.

Plaintiff has failed to meet the criteria of *Perry v. Sinderman*, (1972) 408 U.S. 593, 610, 33 L.Ed.2d 570 respecting the existence of a property right to reemployment. To the contrary, the Defendants have overwhelmingly proven that the beliefs of Mr. Shafer relative to resignation and reinstatement were unilateral and of his own accord.

Given the Court's finding that Plaintiff had no property right to reemployment, the second issue in this analysis regarding due process is resolved as being moot and need not be further addressed.

As to the third issue briefed, the Court has determined that this must be treated as a motion for judgment on the pleadings as no evidence was received ont his point. The Court acknowledges that some of the evidence received addressed this issue, but was not received for that purpose. The Court acknowledges further that, should this action have been tried with respect to the issue of a free speech deprivation, Plaintiff, had intended on presenting additional evidence. Because of the manner in which this motion is being treated, the Court must view the facts in the light most favorable to the Plaintiff and therefore presumes that, if this matter were to proceed to trial, Plaintiff could establish that he was denied re-employment as a result of an otherwise protected exercise of his right to free speech. The Court does not rule that these facts are established by the evidence, only that they are presumed for purposes of this ruling.

The Court finds that, as a matter of law, Plaintiff cannot state a claim for violation of his rights of free speech.

Plaintiff contends that the case of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) forms the basis for his claim. This Court distinguishes the instant case from *Mt. Healthy* and all other cases relied upon by Plaintiff. The Court finds that this case is more closely analogous to *Messer v. Curci*, 881 F. 2d 219 (6th Cir. 1989), insofar as Plaintiff is viewed as a mere applicant for employment, with no right to reinstatement. The Court views the cases relied upon by Plaintiff as analogous to termination cases, irrespective of language contained therein that the free speech claims are not dependent on the existence of a property right. The Court notes that Plaintiff has failed to cite any case or authority that stands for the proposition that a cause of action lies for failure to hire a new job applicant because of a previously exercised constitutional right, such as freedom of speech. Plaintiff was not dismissed from employment for writing his article. He voluntarily resigned and was subsequently not rehired as a new job applicant.

The Court has not found any authority or holding that it violates the Federal Constitution when a person is not hired based upon something that the person previously stated in an exercise of free speech.

The Court has reviewed the cases submitted by all parties including *Board of Regents of State of California v. Roth* (1972) 408 U.S. 564, 33 L.Ed.2d 548 and *Perry v. Sinderman* (1972) 408 U.S. 593, 610, 33 L.Ed.2d 570 in analyzing this issue. The Court finds that Plaintiff's case does not constitute a discharge or dismissal from employment because of a First Amendment exercise.

As in the case of *Messer v. Curci* (6th Cir. 1989) 881 F.2d 219, 221, the Plaintiff in the instant matter was a job applicant seeking rehire. Plaintiff had been separated from the City of Oceanside for at least six months before he sought reinstatement. He was therefore a new job applicant seeking hire in the Fire Department.

Based on the foregoing, judgment is entered in favor of Defendant in his matter as to all civil rights related causes of action. Plaintiff has also alleged an additional cause of action against Defendant Mamaux for intentional infliction of emotional distress. This Court finds that the intentional infliction of emotional distress claim is entirely contingent upon the existence of a constitutional right, allegedly violated by Defendant Mamaux. Since this claim is dependent on the dismissed claims, it must be dismissed as well. It is directed that judgment be entered on this cause of action in favor of Defendant Mamaux.

IT IS SO ORDERED.

Date: Aug. 3, 1994

/s/ Herbert B. Hoffman
HERBERT B. HOFFMAN
Judge of the Superior Court